Before the
LIBRARY OF CONGRESS
Washington, D.C. 20024

In the Matter of	)	
	)	
ADJUSTMENT OF RATES FOR	)	Docket No. 96-6 CARP NCBRA
NONCOMMERCIAL EDUCATIONAL	)	
BROADCASTING COMPULSORY LICENSE	)	

PETITION OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO MODIFY THE REPORT OF THE ARBITRATION PANEL, DATED JULY 22, 1998

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Pursuant to 37 C.F.R. § 251.55(a), the American Society of Composers, Authors and Publishers ("ASCAP") hereby petitions the Librarian of Congress (the "Librarian") to modify the Report of the Copyright Arbitration Royalty Panel (the "Panel"), dated July 22, 1998 (the "Report"). In the Report, the Panel set the statutory rates and terms for public performances by Public Broadcasters of musical compositions in ASCAP's repertory for the period January 1, 1998 through December 31, 2002. The Panel also set rates and terms applicable to the repertory of Broadcast Music, Inc. ("BMI").

INTRODUCTION

This Petition concerns only two features of the Report: (i) the Panel's determination of the amount of the license fee to be paid by Public Broadcasters to ASCAP and (ii) the Panel's allocation of arbitrators' fees among ASCAP, Public Broadcasters and BMI.

With respect to that portion of the Report regarding ASCAP's license fee, the Panel explicitly rejected each of the parties' proposed methodologies for determining the amount of that fee. Instead, the Panel developed its own method which purports, but fails in significant ways, to

"key" off the license fee set by the Copyright Royalty Tribunal (the "CRT") in its June 6, 1978 decision (the "1978 CRT Decision").[1]

In its Report, the Panel began by finding that it was bound by the 1978 CRT Decision. That decision provided that the then existing public television and radio stations should pay a fee of $1,250,000 per year to ASCAP (the "1978 Fee"), subject to adjustment for changes in the Consumer Price Index ("C.P.I.") for the years 1979 through 1982. The Panel then adjusted the 1978 Fee upward to reflect the growth in Public Broadcasters' aggregate revenues between 1978 and 1996 and downward to account for certain purported changes in Public Broadcasters' use of ASCAP music over that same period. Then, rather than provide for revenue or C.P.I. adjustments to the fee over the license term, the Panel arrived at a static ASCAP fee of $3,320,000 annually. (Report at 25-26).

Assuming, arguendo, that the Panel's adoption of this formula (the "1978 Trending Formula") is appropriate, the Panel failed to follow the methodology of the 1978 CRT Decision by which it stated it was bound. In so departing, the Panel made several mathematical and methodological errors which result in a significantly understated ASCAP fee. As set forth in Section I of this Petition, the Panel:

- applied the wrong revenue data for calculating Public Broadcasters' revenues at the time of the 1978 CRT Decision by using 1978 data instead of the 1976 data actually available to the CRT;

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[1] For the convenience of the Librarian, a copy of the 1978 CRT Decision, designated before the Panel as ASCAP Dir. Exh. 8, is appended hereto as Appendix A. Certain other exhibits referred to herein are similarly reproduced in appendices to this Petition. All citations to the record herein are made consistent with their designation by the Panel in the Report.

- applied the wrong financial data in calculating Public Broadcasters' total gross revenues for 1996 by excluding $122 million in "ancillary income;"

- failed to make necessary adjustments to the ASCAP fee during the term of the proposed regulations to account for inflation and the projected growth in Public Broadcasters' revenues as the CRT specifically did; and

- incorrectly inferred a relationship between ASCAP's fee and "music share," a circular approach rejected by the CRT as being contrary to Section 118, and thereby improperly reduced ASCAP's fee for a presumed drop in ASCAP's music share since 1978.

Because the Panel did not disclose that it would rely so heavily on the 1978 Fee or that it would adopt the 1978 Trending Formula prior to the making of its Report, ASCAP did not have an opportunity to alert the Panel to its errors. ASCAP thus petitions the Librarian to rectify the Panel's errors in order to avoid an arbitrary application of the 1978 Trending Formula and, consequentially, an arbitrary result.

Notwithstanding its request for certain necessary adjustments to the formula, ASCAP believes the record before the Panel does not support the adoption of the 1978 Trending Formula. Rather, that record requires the use of commercial benchmarks as the most appropriate method for deriving reasonable license fees for Public Broadcasters. Section II of this Petition addresses the legal and evidentiary basis for the commercial rate-setting approach proposed by ASCAP. Finally, Section III of this Petition addresses the Panel's misallocation of arbitration costs, a misallocation which is unprecedented, inappropriate and which, in the long run, will do mischief to future CARP proceedings.

I.

THE PANEL'S APPLICATION OF THE 1978 TRENDING FORMULA CONTAINS PATENT ERRORS WHICH ARBITRARILY UNDERSTATE THE ASCAP LICENSE FEES AWARDED

According to the Panel, the 1978 Trending Formula is designed to serve as a neutral method for determining the market value of ASCAP's repertory to Public Broadcasters. Specifically, the Panel intended that its formula would determine what Public Broadcasters would pay and what ASCAP would accept as a license fee in the absence of the compulsory license provided under 17 U.S.C. § 118 ("Section 118"). (Report at 9-10). In support of its position, the Panel reasoned:

- The 1978 Fee of $1,250,000 presumably established the fair market value of Public Broadcasters' access to ASCAP's repertory in 1978. (Report at 10, 25);
- The 1978 Fee may be "adjusted" to account for the growth in Public Broadcasters' revenues since the CRT's decision as a means of reflecting Public Broadcasters' increased ability to pay license fees. (Id. at 25, 27-31);
- The 1978 Fee may be "adjusted" further to account for changes since 1978 in the relative shares of ASCAP and BMI music broadcast on PBS-affiliated television stations. (Id. at 31-34);
- The 1978 Fee as so "adjusted" is an appropriate proxy for license fees which would otherwise be due from public radio stations to ASCAP and BMI. (Id. at 25-28, 32 n.42); and
- The 1978 Fee, so adjusted, thus represents the fair market value of the ASCAP repertory to all public television and radio stations in each of the years 1998 through 2002. (Id. at 37-39).

Mathematically, the Panel's 1978 Trending Formula may be represented as follows:

$$\text{1998 ASCAP FEE} = \text{1978 FEE} \times \frac{\text{1996 PB REVENUES}}{\text{1978 PB REVENUES}} \times \frac{\text{1996 ASCAP MUSIC SHARE}}{\text{1978 ASCAP MUSIC SHARE}}$$

1. The Panel's Use of 1978 Revenues in the 1978 Trending Formula is Arbitrary

In adopting this mathematical formula, the Panel purported to evaluate data available to the CRT during the 1978 proceeding. However, the Panel used Public Broadcasters' aggregate 1978 revenues as a starting point for its revenue growth factor. (Report at 25, 31). As a matter of fact, the CRT could not have based its decision, published on June 8, 1978, on Public Broadcasters' 1978 revenue data. That data was not published until late 1979. See W.D. of Boyle, App. C (FY-1978 data published on 12/31/79). The only revenue data in the record before the CRT in 1978 was published 1976 data, not 1978 data. See PB Exh. 27X at Table 9. Public Broadcasters so admitted in their Reply Findings of Fact and Conclusions of Law: "The Public Broadcasters' analysis begins with revenue information for the year 1976 (versus ASCAP's 1978), since 1976 was the last year for which the CRT had data in establishing a fee." PB Reply PFFCL, Appendix A at 1.

Those 1976 data, found in PB Exh. 27X in the record, reflect aggregate Public Broadcasters' 1976 revenues of $412.1 million, $140 million less than the $552.3 million figure relied upon by the Panel in applying the 1978 Trending Formula. (A copy of the relevant table from PB Exh. 27X is appended hereto as Appendix B.) The Panel's use of 1978 aggregate revenues thus materially understates the "effective license rate" set by the CRT in 1978.

To explain, in trending forward for revenue growth, the Panel implicitly assumed that the CRT had sanctioned the use of a particular fraction of revenues as an appropriate license fee. Based on 1978 data, that percentage, or "effective license rate," would have been .22% of Public Broadcasters' revenues ($1.25 million divided by $552.3 million equals .22% of

revenues).[2] (Report at 25-26, 31). If the 1978 Fee is stated as a percentage of Public Broadcasters' aggregate 1976 revenues (as it should), the correct rate is .303% of aggregate annual revenues ($1.25 million divided by $412 million). To be methodologically consistent, if the Librarian otherwise adopts the Panel's 1978 Trending Formula, the Librarian should use .303% as the effective rate applied against Public Broadcasters' 1996 revenues, not the .22% rate erroneously relied upon by the Panel. If no other changes are made to the fee, this application has the effect of raising ASCAP's annual fee to approximately $4.4 million annually. See Point I(5), infra at 20.

The Panel's only substantive explanation for its reliance upon 1978 revenues in creating an "effective rate," rather than the 1976 revenues actually available to the CRT, was that "use of 1976 total revenues on our formula would yield higher license fees for 1996 because the growth in revenues would be higher." (Report at 31 (emphasis in original)). There is no basis in the record for making a material adjustment in favor of Public Broadcasters merely because the fee generated by the formula might be "too high." Such an adjustment is inconsistent with the Panel's findings that "the change in Public Broadcasters' revenues is the best indication of relevant changed circumstances which require an adjustment of the chosen benchmark." (Report at 27). As noted below at page 14, the Panel's decision must be grounded in the record evidence and its findings must be applied in a consistent manner. Here, Public Broadcasters are neither entitled to, nor require, any subsidies from the Panel in the form of arbitrary adjustments to a

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[2] Although, as in this proceeding, "Public Broadcasters" in 1978 consisted of hundreds of television and radio stations in the U.S., the stations reported their finances as a group. The

(continued...)

supposedly neutral formula at the expense of ASCAP's members. The Copyright Act prohibits subsidization, as the Panel expressly found in its Report. (Report at 9); S. Rep. No. 94-473, 1st Sess. at 101 (1975) (ASCAP Direct Exh. 4); H.R. Rep. No. 94-1476 at 118 (1976) (ASCAP Direct Exh. 5). Nor is there any basis for believing that Public Broadcasters are unable to pay license fees based upon the application of 1976 revenue data to the formula, even assuming that "ability to pay" was relevant under Section 118. The record is replete with evidence demonstrating the ability of Public Broadcasters to absorb the substantially larger fee increases proposed by ASCAP in its Direct Case. E.g., ASCAP PFFCL 113-115.

2. The Panel's Exclusion of $122 Million of Public Broadcasters' 1996 Revenues Was Arbitrary

In conducting its review of the changes in Public Broadcasters' revenues since the 1978 CRT Decision, the Panel next attempted to ascertain the extent of Public Broadcasters' "current" revenues. Because published data was not yet available for 1998 or 1997, the Panel relied on published 1996 revenues as a surrogate for 1998. (Report at 30). (The portions of the 1996 revenue report actually relied upon the Panel, originally contained in ASCAP Exh. 31X, are appended hereto as Appendix C). In its application of the 1978 Trending Formula, the Panel applied its own 1978 effective license rate of .22% (instead of the CRT's actual .303% rate) against a "preliminary" 1996 revenue figure of $1,955,726,000 listed on page 6 of ASCAP Exh. 31X.

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data presented to both the CRT in 1978 to the Panel in this proceeding was an aggregation of the revenues generated by individual stations. See, e.g., PB Direct Exh. 4; PB Exh. 27X.

The quoted revenue figure, however, does not include all of Public Broadcasters' 1996 revenues. Later in the same Exhibit relied upon by the Panel, Public Broadcasters disclose that they had $122,050,000 in "ancillary revenues" in 1996, in addition to the $1,955,726,000 in "preliminary" 1996 revenues. (See Appendix C at 13). These "ancillary revenues" are comprised largely of the sale of public broadcasting merchandise such as videos, audiotapes, toys and books. The Panel recognized that this revenue existed in 1996 but arbitrarily and, without explanation, excluded it from the 1978 Trending Formula. (Report at 30). This unexplained exclusion of over $122 million is clearly material and manifestly arbitrary -- it understates the overall change in Public Broadcasters' revenues and lowers ASCAP's fee by approximately $205,000 annually. See Point I(5), infra at 20.

The stated reason for the Panel's use of gross revenues in the first instance was that "gross" revenues are the best indication of "the true increase in Public Broadcasters' ability to pay license fees."[3] (Report at 30). The existence of over $122 million in additional "gross" revenues in Public Broadcasters' coffers impacts on their "ability to pay."[4] If the Librarian agrees with the Panel that the change in Public Broadcasters' financial resources is relevant, all gross

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[3] In its proposed methodology described in Section II infra, ASCAP also excluded all ancillary income from its commercial fee calculation. That exclusion, however, was based on the fact that, in licensing commercial broadcasters, revenues subject to ASCAP's license fee do not include the equivalent of ancillary income. If the issue is one of Public Broadcasters' "ability to pay," as opposed to what commercial broadcasters pay to ASCAP, the income must be included to be internally consistent.

[4] That such revenues are not factored into Public Broadcasters' published revenue statements is irrelevant – the determination of reasonable fees under Section 118 should not be dictated by accounting decisions as to where and how certain categories of revenues will be reported for the purpose of Congressional appropriations. See ASCAP PFFCL 39-40.

revenues, including ancillary revenue, should be factored into the 1978 Trending Formula. That inclusion would be consistent with the Panel's finding that "total revenues" reflect the "true increase" in ability to pay. (Report at 30). The Librarian should therefore substitute total 1996 revenues of $2,077,776,000 for the partial 1996 revenues of $1,955,726,000 inexplicably used by the Panel in its application of the 1978 Trending Formula.

3. The Panel's Failure to Follow the 1978 CRT Decision and Provide for Interim Adjustments to the Fee to Account for Potential Changes in Public Broadcasters' Revenues or Inflation Was Arbitrary

Because the ASCAP fee awarded by the Panel was ultimately derived from 1996 revenue data, not 1998 data, the resulting fee is more realistically described as a "1996 fee." Obviously, a "1996 fee" does not necessarily represent a fair market valuation of ASCAP's repertory for the period 1998 through 2002. As it stands, the ASCAP fee does not capture any of Public Broadcasters' actual and anticipated revenue increases since 1996, nor is there any protection for ASCAP against inflation – a factor for which the CRT explicitly accounted in 1978. As the Panel stated, "we make no adjustment for revenue increases since 1996, nor for revenue increases which shall likely occur throughout the statutory license period. Though too speculative to quantify, Public Broadcasters appear poised for substantial revenue increases." (Report at 30).

Even assuming that such increases are "speculative" (there was certainly substantial evidence that radical increases are expected), the Panel should have allowed for interim adjustments to the ASCAP fee. For example, the Panel could have stated the award as a "rate." Given the foregoing discussion in Points 1 and 2, the adjusted ASCAP award could be stated as ".303% of Public Broadcasters' total aggregate annual revenues, including ancillary income." That rate could then be applied against Public Broadcasters' 1998, 1999, 2000, 2001 and 2002 revenues to generate

annual license fees. This "rate" approach is similar to the manner in which ASCAP currently licenses many of its commercial users. See, e.g., ASCAP Direct Exh. 20.

In the 1978 CRT Decision, the CRT also recognized the shortcomings of the "do nothing" approach adopted by the Panel here. There, rather than adopting a rate for the entire five-year term of the regulations, the CRT imposed interim C.P.I. adjustments: "The CRT believes it would be unfair to copyright owners if the schedule did not make some provision for changes in the cost of living [over the term of the regulations.]" 1978 CRT Decision, App. A at 25070. Interim cost of living adjustments are traditionally a part of Section 118 regulations. See 1992 Adjustment of the Public Broadcasting Royalty Rates and Terms, 57 Fed. Reg. 60954, 60957 (Dec. 22, 1992); Noncommercial Educational Broadcasting Compulsory License: Final Rule, 63 Fed. Reg. 2142, 2145 (Jan. 6, 1998) (current regulations for college and university stations) (updating 37 C.F.R. § 253.10, entitled Cost of Living Adjustment); see also Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities, 60 Fed. Reg. 61654 (Dec. 1, 1995); Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities, 61 Fed. Reg. 60613 (Nov. 29, 1996).

Here, the Panel acted in a patently contradictory fashion when it afforded precedential value to the amount of the 1978 Fee but failed to incorporate the C.P.I. adjustments which were an integral part thereof. The Panel also acted arbitrarily when it failed to offer any justification for its omission of C.P.I. adjustments either to translate the 1996 fee into "1998 dollars" or to account for inflation over the term of the regulations. As recently stated by the Librarian, a CARP's actions will be deemed "arbitrary" if it deviates from CARP and CRT precedent without a rational basis for doing so:

> In such matters where the Panel failed to discuss any relevant case law or past precedent construing the statutory objective before rendering its determination, the Register finds the Panel acted in an arbitrary manner. The finding is based on the Panel's failure to consider CRT precedent and to provide a rational basis for its departure from prior proceedings construing the same statutory objective. See Pontchartrain Broad. v. FCC, 15 F.3d 183, 185 (D.C. Cir. 1994) ("an unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious").

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 96-5 CARP DSTRA, 63 Fed. Reg. 25394, 25406 (1998) ("1998 CARP-DSTRA Decision"). As further noted by the Librarian, "while no Panel need slavishly adhere to the past practices of the CRT, it must articulate a reasoned explanation for its deviation from past precedent. Otherwise its actions may be construed as arbitrary and contrary to law." Id. at 25402 (emphasis added).

In the absence of an explanation from the Panel as to why it omitted C.P.I. adjustments integral to the 1978 Fee, the Librarian must "carry over" the practice of making interim adjustments. Should the Librarian agree, the current regulations found at 37 C.F.R. § 253.10, can serve as a framework for such adjustments. Alternatively, the Librarian could convert the adjusted award into a fraction of future revenues (0.303%) which would create an inherent hedge against inflation. (Report at 28).

4. The Panel's Downward Adjustment of ASCAP's Fee Based on Music Use Is Not Supported by the Record, the 1978 CRT Decision or Section 118

As the final step in the application of its formula, the Panel adjusted ASCAP's fee downward by 25% to account for what the Panel perceived as a decrease in ASCAP's "share" of the music performed by Public Broadcasters since 1978. That "determination" is erroneous and arbitrary as a matter of law and the record.

(a) The Panel's dependence on music "share" is irrelevant and unsupported by Section 118. There was no dispute before the Panel that the purpose of Section 118 is to compensate ASCAP's members, among others, for the use of their music by Public Broadcasters. For example, the Senate Judiciary Committee stated in its 1975 report,

> The compulsory license is intended to ease public broadcasting's transition from its previous "not for profit" exemption under the copyright law. As such, this provision does not constitute a subsidy of public broadcasting by the copyright proprietors since the amendment requires the payment of copyright royalties reflecting the fair value of the materials used.

S. Rep. No. 94-473, 94th Cong. 1st Sess. 101 (1975) (ASCAP Direct Exh. 4) (emphasis added). The basic principle is that if Public Broadcasters do not "use" ASCAP music in their broadcasts, Public Broadcasters do not need an ASCAP license.

What the Panel overlooked in relying on an analysis of "music share" is that music "share" data does not necessarily have any correlation to actual music use. Obviously, 60% of 1 million performances of music represents more "total performances" of music than 80% of 1,000 performances. If adjustments are to be made for perceived changes in music "mix," one must first look at actual music performances. The Panel's reliance on "music share" merely begs the question: "share" of what?

In relying on share data, the Panel also assumed that all music is fungible, and that the repertories of ASCAP and BMI are completely interchangeable as far as Public Broadcasters, as music users, are concerned. Thus, the Panel was able to assign the same "value" to the two repertories and divide the total "value" by the two organizations' respective music shares. That methodology is not, however, supported by Section 118.[5] In adopting Section 118 Congress explicitly rejected the "royalty pool" model that is the hallmark of Sections 111 and 119 of the Copyright Act. W.D. of Baumgarten. 15-16; ASCAP Direct Exhs. 4, 6; Tr. 441-43. Rather the structure of Section 118 reflects Congress' intent that each copyright society would receive an individualized valuation of its repertory. Ibid.

(b) It was improper for the Panel to "presume" that Public Broadcasters' rate of overall music use has been static since 1978. One of the vagaries of the proceedings before the Panel was that, even though there were voluminous exhibits and testimony in the record as to Public Broadcasters' music use, there was no data as to public performances of music (ASCAP or otherwise) prior to 1992. See ASCAP PFFCL 116-17; PB PFFCL 48-51; BMI PFFCL 47-50. In the Report, the Panel found this to be a fact, yet it inexplicably premised its entire music use adjustment solely on a presumption of static music use prior to 1992: "Given the dearth of empirical, or even anecdotal, evidence to the contrary, it is reasonable to presume that overall

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[5] Nor is the Panel's "lumping" assumption supported in the record. First, all of the prior negotiations between ASCAP, BMI and Public Broadcasters, as well as all other copyright owners subject to Section 118, were conducted separately, evidencing the fact that Public Broadcasters and other users have traditionally treated ASCAP and BMI as distinct vendors. ASCAP PFFCL 131-32. Second, ASCAP and BMI compete with each other, have entirely different repertories and different ways of measuring, valuing and compensating for the public

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music usage by Public Broadcasters has remained substantially constant since 1978." (Report at 32).

Such an arbitrary "presumption" has no place in a Section 118 proceeding. Section 118 requires that any determination of the Panel be made "on the basis of a fully documented record, prior decisions of the CRT, prior copyright arbitration panel determinations, and rulings of the Librarian of Congress under Section 801(c)." 17 U.S.C. § 802(c); see also 17 U.S.C. § 802(f) (decisions of CARPs subject to review by Librarian after "full examination of the record created in the arbitration proceeding"); 37 C.F.R. § 251.49(b) (transcript of testimony, exhibits, papers and requests filed in proceeding constitute the official record). As the D.C. Circuit explained in Nat'l Assoc. of Broadcasters v. Librarian of Congress, No. 96-1449 (D.C. Cir. June 26, 1998), "if the Panel's proposed award is patently arbitrary or plainly contravenes another provision of Title 17, the Librarian's decision to approve the award without modification would constitute 'act[ing] in an arbitrary manner' as well." The Court also stated that the Librarian would "plainly act" in an arbitrary manner, "if, without explanation or adjustment, [the Librarian] adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award."

The lack of evidence of any change in total music use certainly is not a basis for the Panel's factual finding that no change in music use occurred. If there is no evidence to support an adjustment, the adjustment cannot be made, no matter how relevant it might be. See

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performances of their members' music. Tr. 3264. The Panel apparently took neither of these considerations seriously when it treated the two repertories as identical products.

In Re Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP-SRA, 62 Fed. Reg. 5742 (October 28, 1997) ("1998 CARP Satellite Decision").

(c) The record belies the Panel's arbitrary finding that music use has been "static" since 1978. Leaving aside the impropriety of the Panel's presumption that overall music use has remained static since 1978, the presumption is plainly wrong. The Panel was presented with voluminous television music use data for the years 1992 through 1996. Ultimately, the Panel accepted Public Broadcasters' data as being the most comprehensible. (Report at 31-32). That data, sponsored by Dr. Adam Jaffe, presented information regarding the public television stations' music use measured in terms of "minutes of music per hour" and "cues of music per hour." In his review of that data, Dr. Jaffe opined that the rate of Public Broadcasters' performance of music on television did not change substantially between 1992 and 1996. PB PFFCL 51-54. From this observation, and the lack of any data prior to 1992, the Panel concluded that overall music use on public television stations could not have changed substantially since 1978. (Report at 32).

In so concluding, the Panel failed to consider the indisputable fact that the number of Public Broadcasters' broadcast hours (i.e., the amount of time during which Public Broadcasters could perform ASCAP's music) has more than doubled since 1978. Attached hereto as Appendix D is a portion of PB Direct Exh. 3. That Exhibit, and others in the record, demonstrate two facts: (1) the number of public television stations has also grown significantly since 1978 and (2) the amount of annual "air time" per public television station has grown significantly since 1978. For example, in 1976 there were 253 public television stations which averaged 4542 hours of broadcasts annually. PB Exh. 27X, Table 3. By 1978, total television broadcasts hours had grown to 1.3 million hours per year. PB Direct Exh. 3. By 1994, when

Appendix D was released, there were 353 stations averaging nearly 6,500 hours of broadcasts annually. In sum, while there were approximately 1.1 million public television broadcast hours in 1976, there were 2.3 million broadcast hours in 1994.

When evaluating changes in rates of performances of music per hour since 1978, as the Panel did, this growth in broadcast hours must be factored into the analysis. For example, Dr. Jaffe reported that, in 1994, public television stations averaged 18.16 minutes of music per hour. W.D. of Jaffe, "Data Underlying Figures 5 and 6." Given that Public Broadcasters were on the air for 2.3 million hours in 1994, they must have performed 41.2 million minutes of music that year (18.16 x 2.3 million). Further, according to the share data accepted by the Panel, about 60% of that music, or 25.0 million minutes, would have been ASCAP music.

Looking back to 1978, if the existing public broadcasting stations played music at or about the 1994 rate of 18.16 minutes per hour, they would have performed 20.0 million minutes of music in their 1.1 million broadcast hours (18.16 x 1.1 million). If ASCAP had an 80% share of those 20.0 million minutes in 1978, 16.0 million minutes would have been ASCAP music. Thus, even if ASCAP's "share" of total music minutes dropped 25% between 1978 and 1996, the gross amount of ASCAP music performed by Public Broadcasters rose by more than 150% (from 16 million minutes in 1978 to 25 million minutes in 1994).[6] Because, as noted

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[6] ASCAP is not advocating here for a 150% upward music use adjustment to its fee. As ASCAP repeatedly noted to the Panel, there is no evidence in the record from which to make a reasoned finding about music use in 1978 one way or the other. ASCAP PFFCL 116 n.6, 152; W.D. of Boyle 11. In making its inappropriate finding, the Panel clearly misunderstood ASCAP's statement that "the trended fee assumes that music use on the Stations did not change substantially from 1978 to 1990 and there is no evidence in the record to contradict that assumption." (Report at 33 (citing ASCAP PFFCL 116 n.6)). In context, the statement clearly

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above, the purpose of Section 118 is to compensate copyright owners for actual performances of their music, the Panel was clearly erroneous in reducing compensation to ASCAP's members based on an untested assumption of diminished performances since 1978.

(d) Even assuming that "music share" is relevant, there is insufficient record evidence to support the Panel's inferential findings regarding such shares. Even if one were to conclude that "changes in music share" rather than "changes in total music use" is an appropriate consideration, the evidence does not support the Panel's factual finding that ASCAP's share of all music performed by Public Broadcasters has dropped 25% since 1978. (Report at 32).

The only "music share" data before the Panel concerned ASCAP and BMI's respective shares of performances on public television between 1992 and 1996. There was no direct evidence in the record for television shares prior to 1992. The Panel's "inferences" as to what the respective music shares might have been on public television in 1978 is obviously pure speculation. (Report at 33). In a nutshell, the Panel found that, because ASCAP had negotiated a fee of approximately four times that of BMI in 1982 (the Panel is unclear in its findings, citing first that the negotiations occurred in 1981 and then citing 1982 as the appropriate year), ASCAP's music share must have been 80% in 1982. The Panel made this finding despite ASCAP's direct evidence, noted below, that ASCAP had not negotiated in this fashion. From that misassumption, the Panel infers that the same music share must have prevailed four years

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refers to a conservative estimate of the total number of ASCAP performances, not the total of ASCAP, BMI and SESAC performances. As noted above, the total number of all music performances must have risen since 1978 due to increased broadcast hours. Moreover, ASCAP does not sanction "music minutes" or "share data" as appropriate yardsticks of "value." The

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earlier in 1978. (Report at 33). To "test" its assumption, the Panel then examined the 1978 CRT Decision and concluded that the CRT must have been aware of "music shares" when it set a fee for ASCAP, despite the CRT's explicit statement that it had not used BMI data in setting ASCAP's fees. Regardless, the Panel concluded that the CRT could not have meant what it said. (Report at 33). The Librarian should not affirm this sort of circular logic, nor the Panel's obvious disregard of the 1978 CRT Decision and the factual record in this proceeding.

(e) There is no data whatsoever in the record as to "music share" on public radio broadcasts for any year. Finally, the only "music share" data before the Panel concerned programming on public television stations. The Panel explicitly acknowledged the absence of any "music share" data regarding public radio broadcasts. (Report at 32). The absence of radio data is significant, considering that there are currently over 700 public radio stations airing programming containing substantial amounts of ASCAP music. For example, there is undisputed evidence in the record that approximately three quarters of the public radio stations in this proceeding perform music substantially all of the time. ASCAP PFFCL 100-101. Moreover, ASCAP presented uncontradicted evidence showing that these public radio stations play "gargantuan" amounts of ASCAP music. ASCAP PFFCL 92, 100-104. On the other hand, there was no data regarding the amount of the BMI music played on public radio stations – BMI estimated that less than a third of all public radio broadcasts contain any BMI music at all. BMI PFFCL 54-55.

In a footnote, the Panel attempted to "finesse" the lack of radio data by finding that purported music shares on television could be used as a "proxy" for radio. (Report at 32

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foregoing example is merely used to show that if one attempts to compare 1978 data with data

(continued...)

n.42). That finding (that the mix of music in public television broadcasts is exactly the same as that in public radio broadcasts) was not based on any study or evaluation of data in the record. Rather, the Panel merely noted that the parties had "historically" used television music data as a surrogate for radio data when negotiating prior license fees. Methodologically, the Panel's reliance on that convenience in the absence of real data is plainly arbitrary. The Panel found in an extended discussion that the actual fees agreed to in prior licenses were not an appropriate precedent for the current fees. (Report at 20-23). There is no rational basis then for affording precedential value to the manner in which the parties arrived at those fees. If television data was used as a proxy for radio in order to set non-precedential fees, the parties' use of surrogate data is equally non-precedential.

Further, contrary to the Panel's observation, there was no probative evidence to support a finding that ASCAP had ever acquiesced to the use of television data as a proxy for radio. The only evidence arguably supporting the Panel's comment was a statement by the former general counsel from PBS that "all" parties had relied on PBS music share data in prior negotiations. W.D. of Jameson at 5. However, those witnesses with personal knowledge of ASCAP's position in those negotiations, Dr. Peter Boyle and Mr. Hal David, each denied that music use data was ever relied upon by ASCAP in agreeing to prior fees. Both testified without challenge that ASCAP had agreed to fees with Public Broadcasters in 1982, 1987 and 1992 on the basis that the fees represented the 1978 Fee adjusted for inflation, and were in any event "not to be precedential" (as is stated in the licenses at PB Direct Exhs. 11, 12, 13). ASCAP's decision to

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(...continued)

from the 1990's, one must factor in the doubling of broadcast hours.

accept those fees had nothing to do with music use data or a deliberate assessment of Public Broadcasters' use of ASCAP music on television or radio. ASCAP PFFCL 122-33. In light of the foregoing, the Panel lacked a reasonable basis in the evidence to conclude that data on television music share could properly serve as a proxy for radio. Its music share adjustment is therefore patently arbitrary.

5. The Effect of the Proposed Corrections On the Total Fee To Be Paid to ASCAP

In sum, in order to avoid an arbitrary application of the 1978 Trending Formula, the Librarian should at a minimum make the following adjustments: (1) substitute 1976 revenue data for 1978 revenue data; (2) substitute aggregate 1996 revenues, including "ancillary income," for partial 1996 revenues; (3) allow for C.P.I. adjustments both between 1996 and 1998 and over the term of the license; and (4) delete any music use adjustment. As a result of the foregoing, the 1978 Trending Formula should be calculated as follows:

$$\text{1978 FEE} \times \frac{\text{TOTAL PB 1996 REVENUES}}{\text{TOTAL PB 1976 REVENUES}} + \text{INFLATION ADJUSTMENT} = \text{ASCAP ANNUAL FEE}$$

Using the data supplied in the foregoing four Points, the 1978 Trending Formula would yield an annual ASCAP fee of $6,302,400, again subject to C.P.I. adjustments. That calculation is as follows:

$$\$1{,}250{,}000 \times \frac{\$2{,}077{,}776{,}000}{\$\ 412{,}100{,}000} = \$6{,}302{,}400$$

In the alternative, the Librarian could state ASCAP's fee as "0.303% of Public Broadcasters' total 1998, 1999, 2000, 2001 and 2002 revenues, including ancillary income."

II.

SHOULD THE LIBRARIAN REJECT THE PANEL'S USE OF THE 1978 TRENDING FORMULA, THE LIBRARIAN SHOULD ADOPT ASCAP'S PROPOSAL, RELYING ON COMMERCIAL LICENSE FEES AS A BENCHMARK

In adopting the 1978 Trending Formula (which compares the current group of Public Broadcasters to public broadcasters operating in the 1970's), the Panel has departed substantially from rate-setting methods established in recent compulsory license proceedings. The paradigm for setting rates in these proceedings has been an evaluation of what comparable users pay in current markets, not what users paid twenty years ago. As recently stated by the Librarian,

> A benchmark is a marketplace point of reference, and as such, it need not be perfect in order to be considered in a rate-setting proceeding. In the 1988 rate adjustment proceeding for coin-operated phonorecord players, the Tribunal considered different marketplace models and found that each analogy had distinguishing characteristics, but nevertheless considered them in conjunction with the record evidence and that statutory objectives. 1980 Adjustment of the Royalty Rate for Coin Operated Phonorecord Players, 46 FR 884, 888 (1981) ("While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria").

1998 CARP-DSTRA Decision, 63 Fed. Reg. at 25404. In ultimately upholding the Tribunal's ruling in the 1980 jukebox proceeding, the Court of Appeals for the Seventh Circuit stated,

> We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (e.g., with respect to volume and industry structure) and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices.

Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144, 1157 (7th Cir.)(emphasis added), cert. denied, 459 U.S. 907 (1982 ("AMOA"); see also San Antonio v.

United States, 631 F.2d 831, 836-37 (D.C. Cir. 1980), clarified, 655 F.2d 1341 (D.C. Cir. 1981); Burlington Northern, Inc. v. United States, 555 F.2d 637, 641-643 (8th Cir. 1977); In Re Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Docket No. 94-CARP-CD 90-92, 63 Fed. Reg. 20428 (April 24, 1998).

In accordance with these precedents, the rate-setting methodologies proposed by both ASCAP and BMI in this proceeding focused on what commercial television and radio broadcasters are presently willing to pay for access to their repertories.[7] (Report at 23-24). ASCAP's methodology, summarized at ASCAP PFFCL 111, applies current commercial television and radio license rates to a fraction of Public Broadcasters' total revenues and then adjusts the resulting fees for music use differences between the two groups. The proposed fees, set forth at ASCAP PFFCL 112, ultimately represent approximately 65% of what a comparable group of commercial broadcasters would pay to ASCAP for the use of its members' music. ASCAP PFFCL 115.

ASCAP's reliance on the comparability of public and commercial broadcasters is fully grounded in substantial evidence. Whatever differences may have existed in 1978 between a

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[7] Similarly, in a recent CARP rate proceeding, PBS proposed that what commercial cable operators and satellite carriers paid for "basic cable network" programming -- i.e., programming similar to that carried on distant signals retransmitted under Section 119 -- should serve as a benchmark for fees payable to public broadcasters under 17 U.S.C. § 119. The CARP eventually adopted that commercial benchmark. See 1998 CARP Satellite Decision, 62 Fed. Reg. at 55748-49. Other compulsory license rate-settings have been based on commercial analogies similar to that drawn by ASCAP and BMI here. See, e.g., AMOA, 676 F.2d at 1155-56 (jukebox royalties based on analogies to what restaurants and taverns paid, what background music providers paid and what foreign jukebox owners paid); Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176, 184 (D.C. Cir. 1983) (cable operator royalties based on marketplace analogy to what commercial broadcasters paid, even though cable operators "do not rely on advertising").

fledgling public broadcasting industry and the commercial broadcasters then have substantially eroded in the passage of twenty years. The undisputed evidence shows:

- The total number of Public Broadcasters has grown from 452 in 1978 to 1059 in 1997. ASCAP PFFCL 36. The public television stations now reach 99% of American homes, as opposed to 80% in 1978. Id. The public radio stations now reach 92% of American homes, as opposed to fewer than 60% in 1978. Id.

- In 1978, Public Broadcasters earned no "entrepreneurial" or "ancillary income." Beginning in the 1990's, Public Broadcasters, like their commercial counterparts, began focusing on new revenue sources. By 1996, Public Broadcasters had raised over $120 million in ancillary income through aggressive product marketing and new strategic alliances with commercial media enterprises. Such income is expected to increase substantially in the next few years. ASCAP Exh. 31X at 13.

- Since 1978, the focus of Public Broadcasters' broadcast operations has shifted from generating federal, state and local appropriations towards developing income from the sale of commercial spots to businesses and the sale of membership subscriptions to viewers. Public Broadcasters refer to these latter forms of revenues as "audience-sensitive income." ASCAP PFFCL 38-39, 49-50.

- In an attempt to garner more "audience-sensitive" income, Public Broadcasters now tailor the content of their programming to attract increasing audiences. Id. at 66-72. For example, during semi-annual "pledge drives" Public Broadcasters deliberately alter their normal programming to air music-related programming such as The Three Tenors, Riverdance and Les Miserables – all containing ASCAP music. This relatively new pledge programming strategy is specifically intended to increase "audience subscription" revenues. Id. at 67-68, 84, 98-100.

- Public Broadcasters also tailor the content of their regular broadcasts to attract and keep corporate sponsors. In that regard, Public Broadcasters have eased restrictions on commercial underwriting in a manner not dissimilar from commercial sponsorships. Id. at 66-72.

- Due to this marked shift in programming focus, Public Broadcasters' "audience-sensitive income" has grown significantly since the 1978 CRT Decision. As of 1978, Public Broadcasters had raised only $173 million through their broadcast-related activities. W.D. of Boyle App. C. By 1996, approximately $1.10 billion or over 52% of Public Broadcasters' total aggregate revenues were raised from broadcast activities. ASCAP Exh. 31X at 6.

- Over the same period, due to the successes of cable television and shifts in commercial broadcast television programming, Public Broadcasters are no longer the only source of "live performances of television or ballet, regular

presentations of quality drama, and direct live coverage of important public proceedings," as the CRT found in 1978. ASCAP PFFCL 69-72.

In evaluating the foregoing shifts, the Panel found that the "commercialization" of Public Broadcasters "is patent to even a casual observer." (Report at 24).

The existence of this particular finding in the Report reveals a fundamental methodological error in the 1978 Trending Formula. Notwithstanding the "patent commercialization" of Public Broadcasters, the formula fails to compensate ASCAP's members in any way for the increasing importance of their music to Public Broadcasters' broadcast revenue streams since 1978. Rather, the 1978 Trending Formula effectively awards ASCAP the very same percentage of Public Broadcasters' revenues that the Panel assumed the CRT had awarded in 1978. The Panel made no attempt to incorporate a "commercialization" factor into the formula which would shift the 1978 effective license rate towards the higher license rate currently paid by commercial broadcasters. Such a shift is clearly warranted on the record.

To be sure, it is not ASCAP's position that Public Broadcasters are mirror images of commercial broadcasters or that they should currently pay what commercial television and radio stations pay to ASCAP (well over $200 million per year). In its proposed methodology, ASCAP specifically accounts for the differences in size and economic nature of the two groups of broadcasters by focusing on Public Broadcasters' "audience-sensitive income." These broadcast-related revenues, amounting to approximately $1.1 billion in 1996, are entirely dependent on the content of Public Broadcasters' programming. As such, they are the best measure of the value of ASCAP's music used in that programming. Gross or aggregate revenues, such as were used by the Panel in the 1978 Trending Formula, are a more dubious measure of increased commer-

cialism.[8] The Panel noted that the Public Broadcasters operate on a different economic model than do commercial broadcasters, largely because a substantial portion of the Public Broadcasters' gross revenues has traditionally been unrelated to broadcast activities. (Report at 23). The rise in "audience-sensitive" income alone is the true measure of the "patent commercialization" of Public Broadcasters' programming since 1978.

In light of the foregoing, ASCAP maintains that its proposed annual licensing fees of $4,612,000 for the public television stations and $3,370,000 for the public radio stations were well within the "zone of reasonableness" to be determined by the Panel. The fees do "not ignor[e] that it [is] public broadcasting" being licensed, nor do they compel "copyright owners [to] receive . . . an increment less [in] tribute to public broadcasting." Tr. 447-48.

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[8] As ASCAP noted in its rate-setting proposal, gross or aggregate revenues can be an appropriate measure of value received by commercial broadcasters. Indeed, gross revenues have traditionally been used as a means of approximating the value that a musical composition from ASCAP's repertory contributes to a commercial broadcaster's broadcasts. That "surrogate" function ("revenues" for "value") works in the commercial setting precisely because substantially all of a commercial broadcasters' revenues are tied to their broadcasts. (Report at 24). Thus, for example, ASCAP will traditionally receive a portion of a broadcaster's advertising revenue generated in a broadcast containing the performance of an ASCAP composition. ASCAP PFFCL 12-14.

III.

THE PANEL ERRED IN ITS ALLOCATION OF COSTS AMONG THE PARTIES

At pages 38 and 39 of the Report, the Panel determined that ASCAP and BMI should each should bear one-third of the costs of this proceeding and that PBS and NPR together should pay the other one-third. For the following reasons, ASCAP requests that the Librarian set aside the Panel's cost allocation and instead apportion costs equally between copyright owners (ASCAP and BMI) and copyright users (PBS and NPR) as ASCAP and BMI had proposed to the Panel.[9] See ASCAP's Letter to the Panel, dated June 8, 1998.

Section 802(c) of Title 17 provides that "the parties to [rate] proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct." See also 37 C.F.R. § 251.54(a)(1)(same). Section 802(c) further requires the Panel to act on the basis of precedent established by the CRT, other CARPs and the Librarian of Congress. Indeed, as was noted above, a CARP is deemed to act arbitrarily if it departs from precedent without articulating a rational basis for doing so.

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[9] Under Section 802(f), the Librarian must review the Panel's entire report, including the Panel's allocation of costs among the parties which the Panel considered to be part and parcel of its rate determination. See also In Re Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653, 66657 (Oct. 28, 1997) (In order to make recommendations to Librarian, Register "must review the entire [CARP] report"). Indeed, in reviewing the Panel's decision in the cable distribution proceeding, the Librarian included a review of at least one decision by the Panel that was collateral to and not a part of the Panel's final determination. Id. at 66659-60 (reviewing the Panel's Jan. 26, 1996 Order regarding Fox under arbitrary or contrary to law standard).

Since the replacement of the CRT with CARPs in 1993, there have been only two other litigated compulsory rate proceedings. In both, copyright owners and users proposed to share arbitration costs equally and, in exercising their statutory authority to allocate costs, the CARPs divided the costs equally between owners and users. See Report of Panel in Re Rate Adjustment for the Satellite Carrier Compulsory License, dated August 28, 1997, at 54 (seven copyright owners groups/two copyright user groups); In Re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Docket No. 96-5 CARP DSTRA (one copyright owner/three copyright users). Despite the existence of these binding precedents, the Panel here imposed two-thirds of the costs of this proceeding on copyright owners and one third on Public Broadcasters. The Panel offered no rational basis for rejecting precedent and ordering copyright owners to pay two-thirds of the costs of this proceeding. Contrary to Section 802(e), the Panel did not set forth any "facts" relevant to its fee determination, other than a vague reference to "the totality of the circumstances, including the 1978 CRT decision, the history of negotiations between the parties, and the manner in which the parties proceeded herein." (Report at 39).

There is, however, nothing in the CRT's 1978 determination that could support the Panel's cost allocation. As the Copyright Office noted in its May 9, 1994 Federal Register notice, prior to passage of the 1993 CRT Reform Act, no party bore the costs of CRT rate proceedings. 59 Fed. Reg. 23964, 23977 (May 9, 1994). CRT costs were borne fully by the Office. Thus, the CRT was never faced with the issue of cost allocation. The "negotiating history of the parties" also fails to support the Panel's fee allocation. At all times during the license negotiations (which have taken place since 1978) there were four parties involved: (1) PBS and (2) NPR on one hand, and (3) ASCAP and (4) BMI on the other. The record before the Panel was that representatives of both PBS and NPR participated in each of the prior license

negotiations with ASCAP and BMI; that both PBS and NPR were separate parties to each of their agreements with ASCAP and BMI; and that both PBS and NPR separately executed each license agreement on behalf of the individual stations represented by them. See PB Direct Exhs. 11 at 7, 12 at 7, 13 at 7, 14 at 9, 15 at 12, 16 at 10 (executed license agreements); PB Exh. 30X (minutes of 1992 negotiations); Tr. 2686, 3423, 3566-3567. The evidence regarding the parties' negotiating histories thus supports the equal cost allocation between copyright owners and users proposed by ASCAP and BMI, not the allocation determined by the Panel.

The record regarding "the manner in which the parties proceeded herein" does not support the Panel's determination that Public Broadcasters constitute "one party" for purposes of cost allocation. PBS and NPR each filed separate notices of intent to participate in the proceeding. PBS and NPR maintained that they constituted a single party merely because they "presented a unitary case with common counsel, overlapping evidence and witnesses, and a combined fee proposal." While ASCAP and BMI did not present a joint case, their evidence overlapped as well and each proposed a benchmark based on the license fees paid by commercial broadcasters. NPR and PBS were each represented by separate record counsel as well, as evidenced by the myriad pleadings filed in this proceeding on their behalf. In any case, any decision by the Panel to award costs based on the simple use of "common counsel" or "common experts" clearly would be arbitrary.

Public policy also demands fairness in cost allocation, as the Librarian has previously recognized. In initially adopting 37 C.F.R. § 251.54(a)(1), the Librarian rejected the NCTA's claim that the NCTA should be exempt from costs in any rate proceeding it did not initiate, and held: "The effect of putting the costs on the petitioner would be to make petitioners pay a high price for the periodic rate reviews that are already scheduled and contemplated by

Congress." 59 Fed. Reg. at 23977-78. The Librarian further opined that because rate reviews are a matter of public interest, "the burden [of costs] should be shared by both the owners and users." Id. at 23978.

In the Office's own words, it would be a "high price" to force copyright owners in this proceeding to bear a disproportionate burden of the arbitration costs. This is particularly true when voluntary negotiations fail and copyright owners such as those represented by ASCAP have no choice but to engage in a Congressionally-mandated rate proceeding. Fairness dictates an equal division of costs, which is consistent with prior precedent and which imposes equal burdens of the proceeding on copyright owners and users.

CONCLUSION

For the foregoing reasons, ASCAP respectfully requests that the Librarian:

(a) make the modifications requested in Section I above;

(b) if it rejects the method used by the Panel, adopt the method of determining fees for ASCAP set forth in Section II above; and

(c) in any event reallocate the costs assessed by the Panel equally between copyright users and owners.

Dated: New York, New York
August 5, 1998

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[1410-01]

Title 37—Patents, Trademarks and Copyrights

CHAPTER III—COPYRIGHT ROYALTY TRIBUNAL

PART 304—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL BROADCASTING

Terms and Rates of Royalty Payments

AGENCY: Copyright Royalty Tribunal (CRT).

ACTION: Final rule.

SUMMARY: Copyright Royalty Tribunal adopts rule establishing the terms and rates of royalty payments for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works by public broadcasting entities as required by 17 U.S.C. 118(b). The rule also establishes procedures by which copyright owners may receive reasonable notice of the use of their works, and for the keeping by public broadcasting entities of records of such use.

EFFECTIVE DATE: June 8, 1978.

FOR FURTHER INFORMATION CONTACT:

Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, 202-[illegible]-5175.

SUPPLEMENTARY INFORMATION: 17 U.S.C. 118(b) provides that the Copyright Royalty Tribunal (CRT) shall publish a notice in the FEDERAL REGISTER of the initiation of proceedings for the determination of reasonable terms and rates of royalty payments for the use of published nondramatic musical works and published pictorial, graphic and sculptural works by public broadcasting entities. It is further provided that such rates and terms shall be adopted and published in the FEDERAL REGISTER not later than six months after the date of the notice. The required notice was published in the FEDERAL REGISTER of December 8, 1977 (42 FR 62019).

17 U.S.C. 118(b) also requires the CRT to adopt regulations by which copyright owners may receive reasonable notice of the use of their works and for the keeping by public broadcasting entities of records of such uses. Notice of the proposed rulemaking was published in the FEDERAL REGISTER of December 8, 1977 (42 FR 62019).

The CRT conducted public hearings to receive testimony on the establishment of rates and terms of royalty payments, and the regulations required by 17 U.S.C. 118(b), on March 7, 8, 9, 13, 14, 15, and April 6, 1978. In addition to the material presented at these hearings, the CRT received additional written statements and documentary evidence submitted in accordance with the rules of the CRT. The CRT met in public session on May 4 and 31, and June 5 and 6 to consider these matters. The schedule of rates and terms of royalty payments and the regulations were adopted on June 6, 1978.

17 U.S.C. 803(b) requires that every "final determination" of the CRT shall be published in the FEDERAL REGISTER and shall state "in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination."

Before adopting the schedule of rates, the CRT carefully reviewed the legislative history of 17 U.S.C. 118. The CRT found the congressional committee reports (S.R. 94-473 and H.R. 1476) to be particularly useful. The Senate report states that section 118 "requires the payment of copyright royalties reflecting the fair value of the materials used." The House report states that Congress did "not intend that owners of copyrighted material be required to subsidize public broadcasting."

The CRT is required by the legislative history of section 118 to consider the "general public interest in encouraging the growth and development of public broadcasting." The record of this proceeding contains considerable data concerning the size and nature of public broadcasting audiences, the sources of public broadcasting funding, public broadcasting program practices, and the operational structure of public broadcasting. The CRT examined each of these factors in formulating the schedule of rates. The CRT is satisfied that the royalty payments required by the schedule will not have any significant impact upon the ability of noncommercial broadcasting to perform its functions.

The CRT has been impressed by the nature and quality of public broadcasting programming. Public broadcasting affords much of the American public its only opportunity to watch on television live performances of opera or ballet, regular presentations of quality drama, and direct live coverage of important public proceedings. The desire of millions of Americans to view such programs is not being adequately served by commercial broadcasting or cable television.

While aware of the special contribution of public broadcasting to American life, the CRT has also been mandated by the Congress to consider the public interest in "encouragement of musical and artistic creation." Many authors, composers, other artists and copyright owners have made generous contributions of talent and funds to public broadcasting. Both the Copyright Act and equity require that they now receive reasonable compensation for the use of their works by public broadcasting.

The CRT, after study of section 118 and its legislative history, has concluded that it has wide discretion in determining the structure of the rate schedule, and providing for different treatment of copyright owners or public broadcasting entities on the basis of reasonable distinctions rooted in relevant considerations. The CRT has also determined that it has the authority, which it has chosen to exercise, to establish separate schedules of rates for the repertory of certain performing rights licensing associations.

The CRT has adopted the schedule of rates and terms after examination of the justification for proposed rates and terms advanced during the proceedings of the CRT. Offers made by representatives of copyright owners and public broadcasting entities in an effort to execute the voluntary agreements authorized by 17 U.S.C. 118(b)(2) were excluded from consideration. The CRT has determined that the consideration of offers made for the purpose of obtaining voluntary agreements could OPi142 frustrate the intent of Congress, reflected in several sections of the copyright statute (17 U.S.C. 111(d)(5)(A), 17 U.S.C. 116(c)(2), and 17 U.S.C. 118(e)(1)), to encourage voluntary agreements.

Section 118(b)(3) provides that the CRT "may consider the rates for comparable circumstances under voluntary license agreements negotiated." Several voluntary license agreements have been executed and filed in the Copyright Office. As provided in 118(b)(2) such agreements shall be given effect in lieu of any determination by the CRT if the agreements are filed with the Copyright Office within thirty days of execution.

The CRT has examined the voluntary agreements which have been filed with the Copyright Office as to rates and terms for performing and recording rights in musical works. The CRT found that generally the voluntary agreements provided limited guidance in the disposition of the more important issues presented in this proceeding. Concerning performing rights in musical works, the CRT found that the agreement between Broadcast Music, Inc. (BMI) and Public Broadcasting Service and National Public Radio (NPR) neither in its structure or rate of royalty payment was of assistance to the CRT in establishing a royalty schedule for the repertory of the American Society of Composers, Authors and Publishers (ASCAP). The BMI agreement is subject to an adjustment related to the ratio of perfor-

mances of BMI music to total performances of copyrighted music. That ratio is to be applied to the total fees paid for music and, if appropriate, an adjustment is to be made in the fees paid to BMI. It would be the equivalent of traveling in a circle for the CRT to now utilize the BMI agreement as the basis for establishing a reasonable royalty schedule for the use of ASCAP music.

The record of this proceeding indicates that public broadcasting and SESAC did not reach agreement on the amount of the payment in their voluntary license agreement by employing the same formula for establishing a reasonable payment. The SESAC payment, however, is of value as a guide to the reasonableness of the payment to be made to ASCAP under the CRT schedule. SESAC's annual royalty collections are estimated to be between $3 and $4 million, compared to $100 million by ASCAP. The SESAC payment of slightly under $50,000 for performance rights in music can thus be compared to the estimated total payment under this schedule for the use of ASCAP repertory.

In the determination of reasonable royalty payments for the performance of ASCAP musical compositions, the CRT examined a number of formulas. These included an annual flat payment, a fee determined on the basis of market population or size of audience, formulas related to the usage of music, and formulas geared to copyright payments made by commercial broadcasters. In examining possible formulas, the CRT has considered copyright licensing practices by United States commercial broadcasting and foreign public broadcasting systems.

The CRT finds that there is no one formula that provides the ideal solution, especially when the determination must be made within the framework of a statutory compulsory license. Any formula that was chosen would be subject to certain limitations in the absence of appropriate qualifications.

At the outset of this proceeding, public broadcasting recommended that the payment for ASCAP music be on a per composition basis. ASCAP testified that such an approach was not in accord with traditional practice for the licensing of performing rights in music. Public broadcasting subsequently withdrew its per composition proposal. The CRT has determined that a blanket license is the most suitable method for licensing public broadcasting to perform musical works.

The CRT has determined that a payment of $1,250,000 per year is a reasonable royalty fee for the performance by PBS, NPR and their stations of ASCAP music. This payment was adopted on the basis of the entire record of this proceeding and the application of the statutory criteria. The amount of the total payment was not determined by the application of a particular formula, since the CRT had concluded that all formulas examined by it suffered from inherent limitations. The CRT notes, however, that the amount of the payment is approximately what would have been produced by the application of several formulas explored by this agency during its deliberations.

The CRT has adopted this schedule on the basis of the record made in this proceeding. When this matter again comes before the CRT, the CRT will have the benefit of several years experience with this schedule. The CRT does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding.

In addition to establishing terms and rates of royalty payments for National Public Radio and its local stations, the CRT was required to establish rates and terms for several hundred other noncommercial radio stations, the majority of which are licensed to colleges, universities or other nonprofit educational institutions. The CRT has adopted separate schedules of rates for the stations licensed to colleges or other educational institutions, and for those not affiliated either with NPR or colleges.

The record of this proceeding reflects that BMI and SESAC have reached agreement with national representatives of colleges and universities concerning the performance of copyrighted musical compositions by such institutions, including certain noncommercial radio stations. However, no such license agreements have been filed in the Copyright Office, and the time period for filing some agreements may have expired. It is clear that Congress sought to encourage voluntary license agreements. Therefore, to implement this public policy and to remove technical bars to the implementation of such agreements, the CRT provides in this Rule that the rates and terms of such agreements shall apply in lieu of the rates and terms adopted by the CRT. A similar provision applies to any agreements between copyright owners and unaffiliated radio stations.

In establishing the schedule of rates for the performance of copyrighted musical compositions by college and the unaffiliated stations, the CRT in effect was required to establish a relationship among the several performing rights societies as to the value of their repertory and the use of their music. The public broadcasting proceeding was not an appropriate occasion for making such judgments. Accordingly, the ratio resulting from this schedule of rates is not intended in any respect to establish a precedent for any other rate proceeding, including any future proceeding pursuant to 17 U.S.C. 118.

The schedule of rates and terms does not apply to carrier-current stations. The jurisdiction of the CRT is limited to a "public broadcasting entity" as defined in section 397 of title 47. The CRT has not been satisfied that it has jurisdiction to establish rates for carrier-current stations.

The Harry Fox Office was authorized by several hundred music publishers to act on behalf of such publishers in negotiations with PBS and NPR seeking agreement on the licensing of recording rights to certain musical works. A license agreement was executed and filed in the Copyright Office according to 17 U.S.C. 118(b)(2). However, according to the record before the CRT some 17,000 music publishers have not adhered to the license agreement.

The CRT has reviewed the rates and terms of the voluntary agreement and determined that, subject to the jurisdictional limitations of the CRT and the requirements imposed on the CRT by the provisions of section 118, it provides useful guidance to the CRT. The CRT has decided that the copyright owners of musical works which are recorded under the statutory compulsory license by local stations and regional networks of PBS and NPR and other public broadcasting entities shall be compensated for such uses and receive reasonable notice of such uses, as contemplated by the provisions of 17 U.S.C. 118.

The schedule of royalty rates in the Harry Fox agreement applies only to national programs, but the license extends to recordings for all PBS and NPR stations. The testimony by both Harry Fox and PBS witnesses reflects that the royalty rate was determined after negotiations "at great length" and was achieved as part of a general understanding involving issues in addition to the rate of compensation. The record also indicates that there was considerable bargaining over the amount of the recording fees. With this background, the CRT determined that it would be appropriate to retain the Harry Fox rates for recordings of national programs, while establishing a lower rate for all other recordings. The CRT has been persuaded that the royalty rates in the Harry Fox agreement while reasonable as part of an overall settlement were less than could be justified if the rates had been determined solely on the basis of the reasonable value of the copyrighted works recorded.

No voluntary agreements have been executed concerning the use of pictorial, graphic and sculptural works by public broadcasting entities. In addi-

tion, neither past broadcasting practice nor the record of this proceeding provided much useful data for the adoption of a rate schedule by the CRT. Consequently, the payment schedule adopted should not be regarded as a guide to future rate determinations. The current fragmented structure of the visual arts precluded the consideration by the CRT of any form of blanket licensing.

Public broadcasting urged that the CRT require payment and reports of use only for PBS and NPR programs. They argued that local fees would be so low as not to warrant the necessary administrative machinery. The representatives of the visual artists argued that the exemption of local stations and regional networks would exclude payments for at least 30% of public broadcast hours. The CRT has determined that both the Copyright Act and equity require payments for local and regional programs.

The Congress in enacting the Copyright Act has barred any review by CRT of the terms and rates of royalty payments until June 30, 1982, and any change of the schedule adopted in this proceeding until January 1, 1983. The CRT believes that it would be unfair to copyright owners if the schedule did not make some provision for changes in the cost of living. Accordingly, at one year intervals a revised schedule of rates will become effective to reflect the rise in the cost of living, as determined by the Consumer Price Index.

17 U.S.C.(e)(2) requires the Register of Copyrights to submit a report to the Congress on January 3, 1980 advising the Congress concerning voluntary licensing arrangements which have been reached with respect to the use of nondramatic literary works by public broadcast stations. The report is to present legislative or other recommendations, if warranted.

The CRT has determined that it would be appropriate, and perhaps useful to the Congress, if it also on January 3, 1980 presented to the Congress a report of its experience with the operation of section 118. Consequently, the Final Rule provides, after such proceedings as the CRT may determine to conduct, that the CRT shall transmit such a report. The report would not include recommendations or views concerning specific rates and rates of royalty payments since the Congress has determined that such matters shall not be further considered until June 30, 1982.

MINORITY VIEWS OF COMMISSIONERS JAMES AND GARCIA TO SECTION 304.3

We disagree with the opinion reached by the majority in promulgating § 304.3. It is our belief that the record adequately supports a revenue method, not a flat rate. In our opinion the most logical bench mark to establish a rate for Public Broadcasting was to compare it to the established industry practice of commercial broadcasting, where the revenue measure of music has been a negotiated arm's length transaction. The arguments that the revenue proposal would generate too much money for ASCAP is without merit in face of the legislative history. Those most affected by the adoption of this Section are the artists of America.

Accordingly, pursuant to 17 U.S.C. 118(b)(3), 37 CFR Chapter III is amended as follows:

By adding a new Part 304, to read as follows:

Sec.
304.1 General.
304.2 Definition of public broadcasting entity.
304.3 Performance of ASCAP musical compositions by PBS and NPR and their stations.
304.4 Performance of other musical compositions by PBS and NPR and their stations.
304.5 Performance of musical compositions by public broadcasting entities licensed to colleges or universities.
304.6 Performance of musical compositions by other public broadcasting entities.
304.7 Recording rights, rates, and terms.
304.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.
304.9 Unknown copyright owners.
304.10 Cost of living adjustment.
304.11 Notice of restrictions on use of reproductions of transmission programs.
304.12 Amendment of certain regulations.
304.13 Issuance of interpretative regulations.
304.14 Report to Congress.

AUTHORITY: 17 U.S.C. 118(b)(3).

§ 304.1 General.

This Part 304 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic, and sculptural works during a period beginning on the effective date of this Part and ending on December 31, 1982. Upon compliance with 17 U.S.C. 118, and the terms and rates of this Part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(d).

§ 304.2 Definition of public broadcasting entity.

As used in this Part, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(d)(2).

§ 304.3 Performance of ASCAP musical compositions by PBS and NPR and their stations.

(a) Public Broadcasting Service (PBS) and its stations and National Public Radio (NPR) and its stations shall pay the American Society of Composers, Authors, and Publishers (ASCAP) in each calendar year the total sum of $1,250,000 for the performance by PBS, NPR and their stations of copyrighted published nondramatic musical compositions in the repertory of ASCAP. However, for such use from the effective date of this schedule through December 31, 1978, 56 percent of the above sum shall be paid not later than December 31, 1978.

(b) The payment required by paragraph (a) shall be made in two equal payments on July 31 and December 31 of each calendar year.

(c) In the event that in the future an unaffiliated or new radio station becomes a member of NPR, the basic rate described in paragraph (a) hereof shall be increased by the amount ASCAP would have received from said station under § 304.5 and § 304.6 for the balance of the term remaining. In the event a current member of NPR should leave that membership, the basic rate described in paragraph (a) hereof shall be decreased by the amount ASCAP would have received from said station if they had been an unaffiliated station under § 304.5 and § 304.6.

(d) In the event that a station becomes a member or ceases to be a member of PBS, the basic rate described in paragraph (a) shall be increased or decreased by $4,000 for the balance of the term.

(e) Records of use. (1) PBS and NPR shall maintain and quarterly furnish to ASCAP copies of their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs during the preceding quarter (including the title, composer and author, type of use, and manner of performance thereof, in each case to the extent such information is reasonably obtainable by PBS and NPR in connection therewith). No such cue sheets need be furnished prior to October 1, 1978.

(2) PBS and NPR stations shall furnish to ASCAP upon the request of ASCAP a music-use report during one week of each calendar year. No more than 20 percent of the total number of PBS stations, and no more than 20 percent of the total number of NPR stations shall be required to furnish such reports to ASCAP in any one calendar year.

§ 304.4 Performance of other musical compositions by PBS and NPR and their stations.

The following schedule of rates and terms shall apply to the performance by PBS, by NPR, by stations of PBS, and by stations of NPR, of copyrighted published nondramatic musical compositions, other than compositions in the repertory of ASCAP and other

than such compositions subject to the provisions of 17 U.S.C. 118(b)(2).

(a) *Determination of royalty rate.*

For the performance of such a work in a feature presentation of PBS, $100.
For the performance of such a work as background or theme music in a PBS program, $25.
For the performance of such a work in a feature presentation of NPR, $10.
For the performance of such a work as background or theme music in an NPR program, $2.50.
For the performance of such a work in a feature presentation of a station of PBS, $35.
For the performance of such a work as background or theme music in a program of a station of PBS, $10.
For the performance of such a work in a feature presentation of a station of NPR, $5.
For the performance of such a work as background or theme music in a program of a station of NPR, $2.

For the purposes of this schedule series theme music rates shall be double the single program rate for the entire series.

(b) *Payment of royalty rate.* The required royalty rate shall be paid to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year. However, the payment of the royalty fees for uses in 1978, subsequent to the effective date of this schedule, need not be made until January 31, 1979.

(c) *Records of use.* PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that is required by § 304.3(e)(2) to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report.

§ 301.5 Performance of musical compositions by public broadcasting entities licensed to colleges or universities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by nonprofit radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with NPR.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established by this section, the rates and terms of any license agreements entered into by copyright owners and colleges, universities, and other nonprofit educational institutions concerning the performance of copyrighted musical compositions, including performances by nonprofit radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

For all such compositions in the repertory of ASCAP, $90 annually.
For all such compositions in the repertory of Broadcast Music, Inc. (BMI), $90 annually.
For all such compositions in the repertory of SESAC, Inc., $20 annually.
For the performance of any other such composition, $1.

For performances of the repertory of ASCAP, BMI, and SESAC from the effective date of this schedule through December 31, 1978 a fee of 56% of the above rates shall be paid.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI and SESAC not later than January 31 of each calendar year. For performances from the effective date of this schedule through December 31, 1978, the required fee shall be paid not later than September 1, 1978. The required fee for the performance of all other musical compositions shall be paid not later than the end of the calendar year in which the work was performed.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI, and SESAC upon request a music-use report during one week of each calendar year. ASCAP, BMI, and SESAC each shall not in any one calendar year request more than 10 stations to furnish such reports.

§ 301.6 Performance of musical compositions by other public broadcasting entities.

(a) *Scope.* This section applies to the performance of copyrighted published nondramatic musical compositions by radio stations not licensed to colleges, universities or other nonprofit educational institutions, and not affiliated with NPR.

(b) *Voluntary license agreements.* Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and nonprofit radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by nonprofit radio stations, shall apply in lieu of the rates and terms of this section.

(c) *Royalty rate.* A public broadcasting entity within the scope of this section may perform published nondramatic musical compositions subject to the following schedule of royalty rates:

(1) For radio stations with no more than 20 watts transmitter power output:

For all such compositions in the repertory of ASCAP, $180 annually.
For all such compositions in the repertory of BMI, $180 annually.
For all such compositions in the repertory of SESAC, Inc., $40 annually.
For the performance of any other such composition, $1.

For performances of the repertory of ASCAP, BMI, and SESAC from the effective date of this schedule through December 31, 1978, a fee of 56 percent of the above rates shall be paid.

(2) For radio stations with more than 20 watts transmitter power output:

For all such compositions in the repertory of ASCAP, $450 annually.
For all such compositions in the repertory of BMI, $450 annually.
For all such compositions in the repertory of SESAC, Inc., $100 annually.
For the performance of any other such composition, $1.

For performances of the repertory of ASCAP, BMI, and SESAC from the effective date of this schedule through December 31, 1978, a fee of 56 percent of the above rates shall be paid.

(d) *Payment of royalty rate.* The public broadcasting entity shall pay the required royalty rate to ASCAP, BMI, and SESAC not later than January 31 of each calendar year. For performances from the effective date of this schedule through December 31, 1978, the required fee shall be paid not later than September 1, 1978. The required fee for the performance of all other musical compositions shall be paid not later than the end of the calendar year in which the work was performed.

(e) *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI, and SESAC upon request a music-use report during one week of each calendar year. ASCAP, BMI, and SESAC each shall not in any one calendar year request more than 10 stations to furnish such reports.

§ 301.7 Recording rights, rates and terms.

(a) *Scope.* This section establishes rates and terms for the recording of nondramatic performances and displays of musical works on and for the radio and television programs of public broadcasting entities, whether or not in synchronization or timed relationship with the visual or aural content, and for the making, reproduc-

tion, and distribution of copies and phonorecords of public broadcasting programs containing such recorded nondramatic performances and displays of musical works solely for the purpose of transmission by public broadcasting entities, as defined in 17 U.S.C. 118(g). The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.*

(1) For uses described in subsection (a) of a musical work in a PBS distributed program:

Feature	$50.00
Feature (concert) (per minute)	15.00
Background	25.00
Theme:	
Single program or first series program	25.00
Other series program	10.00

(2) For such use of a musical work in a NPR produced program. For purposes of this schedule "National Public Radio" programs includes all programs produced in whole or in part by NPR, or by any NPR station or other nonprofit institution or organization under contract with NPR:

Feature	$10.00
Feature (concert) (per ½-hour)	15.00
Background and theme	2.50

(3) For such uses other than in a PBS distributed television program:

Feature	$20.00
Feature (concert) (per minute)	5.00
Background	10.00
Theme:	
Single program or first series program	10.00
Other series program	5.00

For such uses other than in a NPR produced radio program:

Feature	$5.00
Feature (concert) (per ½-hour)	7.50
Background and theme	2.00

For the purposes of this schedule, a "concert" feature shall be deemed to be the nondramatic presentation of all or part of a symphony, concerto, or other series work originally written for concert or opera performance.

(5) The schedule of fees covers broadcast use for a period of three years following the first broadcast. Succeeding broadcast use periods will require the following additional payment: second three-year period—50 percent; each three-year period thereafter—25 percent; provided that a 100 percent additional payment prior to the expiration of the first three-year period will cover broadcast use during all subsequent broadcast use periods without limitation. Such succeeding uses which are subsequent to December 31, 1982 shall be subject to the rates established in this schedule.

(c) *Payment of royalty rates.* PBS, NPR, or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year. *Provided, however,* That payment of fees for uses in 1978, subsequent to the effective date of this schedule, need not be made until January 31, 1979.

(d) *Records of use.* (1) Maintenance of cue sheets. PBS and its stations, NPR and its stations, or other public broadcasting entity shall maintain and furnish to copyright owners whose musical works are recorded pursuant to this schedule copies of their standard cue sheets listing the recording of the musical works of such copyright owners. Such cue sheets shall be furnished not later than July 31 of each calendar year for recordings during the first six months of the calendar year, and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. No such furnishing of cue sheets shall be required before January 31, 1979.

(2) Content of cue sheets. Such cue sheets shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For concert music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

(e) *Filing of use reports with the Copyright Royalty Tribunal* (CRT)—(1) *Deposit of cue sheets.* PBS and its stations, NPR and its stations, or other broadcasting entity shall deposit with the CRT copies of their standard music cue sheets listing the recording pursuant to this schedule of the musical works of copyright owners. Such cue sheets shall be deposited not later than July 31 of each calendar year for recordings during the first six months of the calendar year, and not later than January 31 of each calendar year for recordings during the second six months of the preceding calendar year. No such deposit of cue sheets shall be required before January 31, 1979.

(2) *Content of cue sheets.* Such cue sheets shall include:

(i) The title, composer and author to the extent such information is reasonably obtainable.

(ii) The type of use and manner of performance thereof in each case.

(iii) For concert music, the actual recorded time period on the program, plus all distribution and broadcast information available to the public broadcasting entity.

§ 301.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

(a) *Scope.* This section establishes rates and terms for the use of published pictorial, graphic, and sculptural works by public broadcasting entities for the activities described in 17 U.S.C. 118. The rates and terms established in this schedule include the making of the reproductions described in 17 U.S.C. 118(d)(3).

(b) *Royalty rate.* (1) The following schedule of rates shall apply to the use of works within the scope of this section:

For such uses in a PBS distributed program:
For a featured display of a work, $30.
For background and montage display, $15.
For use of a work for program identification or for thematic use, $60.
For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule, $20.
For such uses in other than PBS distributed programs:
For a featured display of a work, $20.
For background and montage display, $10.
For use of a work for program identification or for thematic use, $40.
For the display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced, irrespective of whether the reproduced work of fine art is copyrighted so as to be subject also to payment of a display fee under the terms of this schedule, $10.

(2) "Featured display" for purposes of this schedule means a full-screen or substantially full-screen display. Any display less than full-screen or substantially full-screen is deemed to be a "background or montage display".

(3) "Thematic use" is the utilization of the work of one or more artists where the works constitute the central theme of the program or convey a story line.

(4) "Display of an art reproduction copyrighted separately from the work of fine art from which the work was reproduced" means a transparency or other reproduction of an underlying work of fine arts.

(c) *Payment of royalty rate.* PBS or other public broadcasting entity shall pay the required royalty fees to each copyright owner not later than July 31 of each calendar year for uses during the first six months of that calendar year, and not later than January 31 for uses during the last six months of the preceding calendar year. *Provided, however,* That payment of fees for uses in 1978, subsequent to the effective date of this schedule, need not be made until January 31, 1979.

(d) *Records of use.* (1) PBS and its stations or other public broadcasting entity shall maintain and furnish either to copyright owners, or to the offices of generally recognized organi-

zations representing the copyright owners of pictorial, graphic, and sculptural works, copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later than July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year. No such furnishing of listings shall be required before January 31, 1979.

(e) *Filing of use reports with the CRT.* (1) PBS and its stations or other public broadcasting entity shall deposit with the CRT copies of their standard lists containing the pictorial, graphic, and sculptural works displayed on their programs. Such notice shall include the name of the copyright owner, if known, the specific source from which the work was taken, a description of the work used, the title of the program on which the work was used, and the date of the original broadcast of the program.

(2) Such listings shall be furnished not later that July 31 of each calendar year for displays during the first six months of the calendar year, and not later than January 31 of each calendar year for displays during the second six months of the preceding calendar year. No such furnishing of listings shall be required before January 31, 1979.

(f) *Terms of use.* (1) The rates of this schedule are for unlimited broadcast use for a period of three years from the date of the first broadcast use of the work under this schedule.

(2) Pursuant to the provisions of 17 U.S.C. 118(f), nothing in this schedule shall be construed to permit, beyond the limits of fair use as provided in 17 U.S.C. 107, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works.

§ 301.9 Unknown copyright owners.

If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of or unable to locate a copyright owner who is entitled to receive a royalty payment under this Part they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the CRT, upon request, information concerning fees deposited in trust funds.

§ 301.10 Cost of living adjustment.

(a) On August 1, 1979 the CRT shall publish in the FEDERAL REGISTER a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items) from the first Index published subsequent to the effective date of this schedule of royalty payments to the last Index published prior to August 1, 1979. On each August 1 thereafter the CRT shall publish a notice of the change in the cost of living during the period from the first Index published subsequent to the previous notice, to the last Index published prior to August 1 of that year.

(b) On the same date of the notices published pursuant to paragraph (a), the CRT shall publish in the FEDERAL REGISTER a revised schedule of rates which shall adjust those royalty amounts established in dollar amounts according to the change in the cost of living determined as provided in paragraph (a). Such royalty rates shall be fixed at the nearest dollar.

(c) The adjusted schedule of rates shall become effective thirty days after publication in the FEDERAL REGISTER.

§ 301.11 Notice of restrictions on use of reproductions of transmission programs.

Any public broadcasting entity which, pursuant to 17 U.S.C. 118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of no more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before or at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

§ 301.12 Amendment of certain regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time amend, modify or repeal regulations in this Part adopted pursuant to 17 U.S.C. 118(b)(3) by which "Copyright owners may receive reasonable notice of the use of their works" and "under which records of such use shall be kept by public broadcasting entities."

§ 301.13 Issuance of interpretative regulations.

Subject to 17 U.S.C. 118, the Administrative Procedure Act and the Rules of Procedure of the Copyright Royalty Tribunal, the CRT may at any time, either on its own motion or the motion of a person having a significant interest in the subject matter, issue such interpretative regulations as may be necessary or useful to the implementation of this Part. Such regulations may not prior to January 1, 1983, alter the schedule of rates and terms of royalty payments established by this Part.

§ 301.14 Report to Congress.

On January 3, 1980 the CRT, after conducting such proceedings as it may deem appropriate, shall transmit a report to the United States Congress making such recommendations concerning 17 U.S.C. 118 that it finds to be in the public interest.

Effective date: This part becomes effective on June 8, 1978.

Adopted: June 6, 1978.

THOMAS C. BRENNAN,
Chairman,
Copyright Royalty Tribunal.

[FR Doc. 78-16158 Filed 6-7-78; 12:03 pm]

PB 208 27X

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of

Use of Certain Copyrighted)
Works By Noncommercial)
Broadcasting)

STATEMENT OF THE AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS

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Table 3. Total Broadcasting Hours and Annual Average Hours Broadcast Per Station, Public Television and CPB-Qualified Radio Stations, Fiscal Years 1970-76

Fiscal year	Television			CPB-Qualified radio		
	Number of stations[a]	Annual average hours/station	Total annual hours (millions)	Number of stations[a]	Annual average hours/station	Total annual hours (millions)
1970	185	3171	0.6	N.A.	N.A.	N.A.
1971	193	3314	0.6	103	4838	0.5
1972	207	3431	0.7	121	5353	0.6
1973	221	3663	0.8	121	5923	0.7
1974	235	3873	0.9	140	6327	0.9
1975	N.A.	N.A.	N.A.	150	6446	1.0
1976	253	4542	1.1	N.A.	N.A.	N.A.

N.A. - Not available.

a. Figures represent the number of stations on the air at the beginning of the fiscal year, and do not always agree with the number of authorized stations as shown in Table 2.

Sources: Corporation for Public Broadcasting, Public Television Licensees Fiscal Year, 1974, Advance Edition, Table 19, p. 32; Status Report on Public Broadcasting 1977, Advance Edition, pp.14-16; Financial Summary of CPB-Qualified Radio Stations Fiscal Years 1973-1976, Appendix A, Table 1.

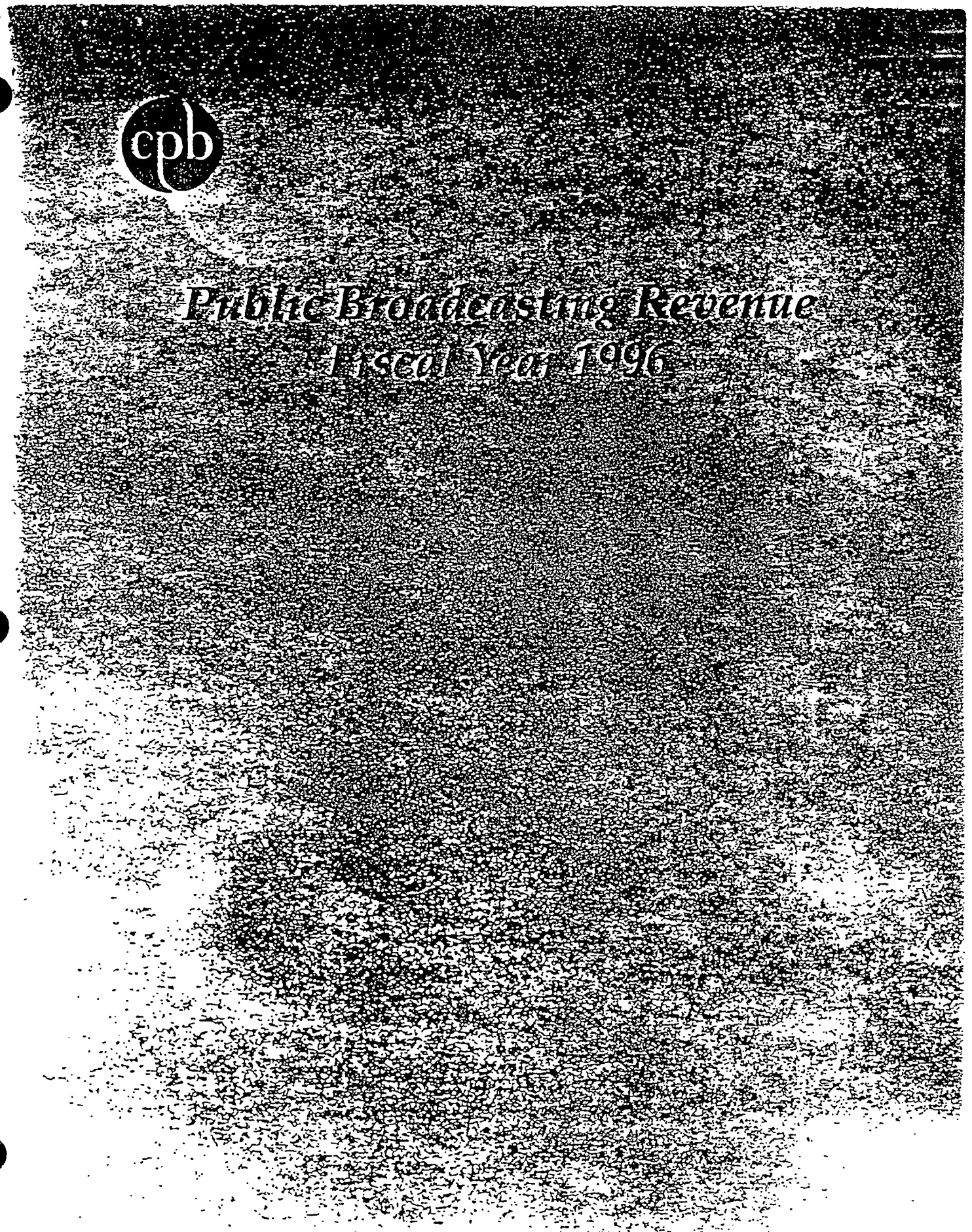
Table 9. Income of Public Broadcasting, Fiscal Year 1976[a]

(millions of dollars)

Source	Public television	CPB-qualified radio	Total
Total income:			
to system	261.4	50.7	412.1
to support organizations	87.2	16.6	103.8
to licensees	274.2	34.1	308.3
Federal income:			
to system	97.8	16.3	114.1
to support organizations	73.3	15.1	88.4
to licensees	24.5	1.2	25.7
Nonfederal income:			
to system	263.6	34.4	298.0
to support organizations	13.9	1.5	15.4
to licensees	249.7	32.9	282.6

a. Preliminary CPB estimates.

Source: Corporation for Public Broadcasting and the National Center for Education Statistics, U.S. DHEW, Education Division, Status Report of Public Broadcasting 1977, Advance Edition, p. 11.



ASCAP 31X

Public Broadcasting Revenue
Fiscal Year 1996

Corporation for Public Broadcasting
September 1997

Table 2

Public Broadcasting Revenue by Source, FY 1996

(Preliminary)

Income Source	Radio System Amount	Radio System % of Total	Television System Amount	Television System % of Total	Public Broadcasting Amount	Public Broadcasting % of Total
CPB Appropriation	68,750,000	14.6%	206,250,000	13.9%	275,000,000	14.1%
Direct Federal	6,346,356	1.4%	57,629,347	3.9%	63,975,703	3.3%
Local Government	11,604,575	2.5%	46,635,071	3.1%	58,239,646	3.0%
State Government	29,691,150	6.3%	257,327,124	17.3%	287,018,274	14.7%
State College	60,145,434	12.8%	95,153,255	6.4%	155,298,689	7.9%
Other Public College	3,975,529	0.8%	13,090,761	0.9%	17,066,290	0.9%
Private College	11,857,842	2.5%	13,776,216	0.9%	25,634,058	1.3%
Foundation	47,966,827	10.2%	110,654,743	7.4%	158,621,570	8.1%
Business	67,639,117	14.4%	223,251,495	15.0%	290,890,612	14.9%
Membership	127,983,078	27.3%	327,534,410	22.0%	455,517,488	23.3%
Auction	2,009,120	0.4%	19,128,152	1.3%	21,137,272	1.1%
All Other	31,436,026	6.7%	115,890,684	7.8%	147,326,710	7.5%
Reportable Gross Income	469,405,054	100.0%	1,486,321,258	100.0%	1,955,726,312	100.0%
Nonfederal Financial Financial Support (NFFS)	394,308,698	84.0%	1,222,441,911	82.2%	1,616,750,609	82.7%

Source: Corporation for Public Broadcasting

Table 5

Entrepreneurial Revenues of Public Televison and Radio Stations
Fiscal Years 1990 - 1996

(In Thousand Dollars)

	Public Television Stations		Public Radio Stations	
Fiscal Year	Amount	% Change fr Prev Year	Amount	% Change fr Prev Year
1990	$46,331	N/A	$7,961	N/A
1991	$49,738	7.4%	$9,171	15.2%
1992	$53,804	8.2%	$11,058	20.6%
1993	$59,936	11.4%	$12,546	13.5%
1994*	$94,896	58.3%	$14,112	12.5%
1995	$89,552	-5.6%	$15,270	8.2%
1996**	$105,983		$16,067	

*Of 1994 Revenue, $19.1 million was "pass-through" revenue to the non-public broadcasting entities and did not benefit television stations.

**Due to the new FASB and CPB NFFS simplification reporting standards, direct comparison between 1996 and prior years' data should be avoided.

Source: Corporation for Public Broadcasting

cpb

Research Notes

No. 87, April 1996

Twenty Years of Public Television Programming: Highlights of the 1994 CPB Programming Survey

CPB's programming surveys have been conducted biennially since 1974. This latest installment reviewed U.S. public television station programming during the 1994 fiscal year—October 1, 1993 through September 30, 1994. Two system-wide programming developments had a significant influence on the 1994 results.

The most far-reaching of these developments was the 1991-92 PBS children's initiative. While the initiative actually occurred two years prior to the 1994 survey period, its full impact was not seen until this survey. The 1994 survey documents a full-scale shift toward increased emphasis on children's product.

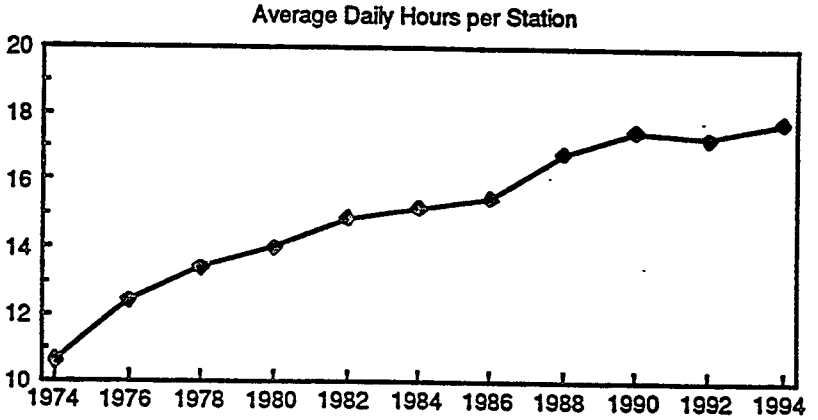
Another development was the addition of a late-night stripped series, *Charlie Rose*. The sheer footprint of this series in the national feed was large enough to notably alter the latest results.

The effects of these most recent developments are reviewed here as are over 20 years of public TV programming history. There are definite patterns in the how public television programming has evolved since 1974 and these patterns have determined where the system stands today.

Trends in the Infrastructure

Public TV is a nearly universal and often duplicative service with a history marked by fairly rapid growth in the years covered by this survey. Today, public TV covers 99% of the U.S. and reaches, as a local service, many of the smallest markets in this country. Between 1974 and 1994 public TV station ranks grew from 238 to 353—a 48% increase. In 1974 the average public broadcaster was on the air for 10.6 hours a day. In 1994 that figure was 17.8—a 68% rise (Figure 1).

Figure 1: Trends in Broadcast Hours



At the same time the number of stations per licensee—one measure of duplication—was also increasing. In 1974, the number of stations per public broadcaster was 1.6, while in 1994 the figure was 1.8—a smaller 13% gain. (For more detail on these and other trends discussed in this paper, see Table 1 at the back of this document.)

The History of PTV's Programming Mission

Over the last 20 years, four patterns emerge that have a major role in today's definition of the public TV programming:

- *The rise of the news presence.* A nightly news presence was once only a gleam in the eye of public TV executives. When it became a reality, it began a trend that continues to the present.
- *The discovery of ratings.* Once public TV programmers realized that viewing was a necessary precursor to membership, they increasingly relied on information and skills programming—how-tos, nature, science, exercise and history—to increase the number of viewers at their stations.
- *The decline of culture.* An increase in news and informational programming as well as a more competitive marketplace meant less time and product for cultural fare such as drama, film, music/dance and comedy.
- *The revitalization of children's programming.* After years of steady scheduling, air time for children's programming declined in the 1980s as ratings dropped. Today however, children's programming has reclaimed its lost territory and gathered significantly more.

The Rise of the News Presence. The early 1980s saw public TV executives seriously discussing an increased nightly news presence. They desired to be a major player in the American news arena. Information had always been within the scope of public TV programming but, up to this point, public TV did not offer daily coverage of current events. The goal was simple: to have an increased influence in shaping American's perceptions of the world around them.

Table 1
Public Television Programming, 1974-1994 [1]
Historical Trends -- Part I

System Characteristics	1974	1976	1978	1980	1982	1984	1986	1988	1990	1992	1994
Number of Television Stations	238	253	272	281	291	303	305	322	341	349	349
Number of Broadcasters	151	152	156	160	164	169	178	186	193	198	198
Broadcasters in the Survey [2]	151	152	156	160	164	169	178	169	176	178	181
Broadcast Hours/Number of Programs											
Average Annual Hours per Broadcaster	3,872	4,542	4,894	5,128	5,421	5,542	5,650	6,135	6,392	6,303	6,500
Average Annual Number of Programs per Broadcaster	6,547	7,607	8,282	8,823	9,162	8,978	9,327	10,127	10,319	9,862	10,379
Percentages of Broadcast Hours											
Program Content											
General	82.7	84.3	86.8	86.8	86.6	87.9	85.9	84.6	86.3	89.8	91.6
News and Public Affairs [3]	12.6	11.9	11.0	12.2	12.4	14.1	16.4	16.3	17.6	17.4	19.2
Information and Skills	15.9	19.9	23.6	22.8	24.5	25.5	29.5	31.7	31.5	28.7	26.8
Cultural	17.9	20.9	22.1	21.9	22.6	20.1	20.5	17.9	19.1	17.5	16.0
General Children's & Youth [4]	10.7	10.0	8.7	8.9	7.5	7.9	6.5	5.8	6.0	14.6	19.8
Sesame Street	21.2	17.8	16.1	15.5	14.8	14.8	11.4	11.7	11.2	11.0	9.2
Other General	4.4	3.8	5.3	5.5	4.8	5.5	1.6	1.2	0.9	0.6	0.6
Instructional [5]	17.1	16.6	14.9	14.7	14.3	13.0	14.5	15.5	13.7	11.6	8.9
Children & Youth	15.2	15.2	13.7	13.7	12.9	12.4	--	--	--	8.7	5.8
Adult	1.9	1.4	1.2	1.0	1.4	0.6	--	--	--	2.9	3.1

Notes:

1. 1974 and 1976 are calendar years. 1978 to 1994 are October through September fiscal years.
2. In 1988, 1990, 1992 and 1994 only broadcasters in the 50 US states were surveyed.
3. In 1986, 1988, 1990, 1992 and 1994 the News and Public Affairs category included "Business or Consumer".
4. General children and youth category does not include Sesame Street since this is reported separately.
5. After 1974, some general audience programs with instructional applications were double counted if aired during school hours when school in session. The Electric Company was one such program when it ran on Public Television. Columns may total to more than 100% due to this double counting.

Table 1
Public Television Programming, 1974-1994 [1]
Historical Trends -- Part II

System Characteristics	1974	1976	1978	1980	1982	1984	1986	1988	1990	1992	1994
Number of Television Stations	238	253	272	281	291	303	305	322	341	349	349
Number of Broadcasters	151	152	156	160	164	169	178	186	193	198	198
Broadcasters in the Survey [2]	151	152	156	160	164	169	178	169	176	178	181
Broadcast Hours/Number of Programs											
Average Annual Hours per Broadcaster	3,872	4,542	4,894	5,128	5,421	5,542	5,650	6,135	6,392	6,303	6,500
Average Annual Number of Programs per Broadcaster	6,547	7,607	8,282	8,823	9,162	8,978	9,327	10,127	10,319	9,862	10,379
Percentages of Broadcast Hours											
Producer [3]											
Local (Broadcaster's Facilities)	11.4	10.1	7.7	7.0	6.7	5.7	5.2	5.2	4.6	4.1	4.6
Any PTV Source	45.4	48.2	52.2	46.2	45.6	44.4	37.6	27.1	32.0	31.0	32.8
Consortium/Co-Production [4]	2.5	1.7	1.8	2.7	2.6	3.3	3.1	9.8	9.7	6.2	5.8
Children's TV Workshop	22.0	18.8	16.8	17.1	15.8	16.4		16.1	15.2	14.1	12.1
Independent and CTW							< 29.1 >				
Independent Producer	5.9	6.1	5.3	7.9	11.3	9.2		19.4	18.7	25.2	25.9
Foreign Producer				7.8	6.0	8.9	11.0	8.7	7.7	10.7	10.0
Any Foreign Participation	5.8	7.6	9.1								
International Coproduction				4.7	4.1	4.3	4.1	5.3	4.6	0.7	0.4
Commercial Producer	1.9	2.8	2.7	3.2	3.9	2.8		4.4	4.3	4.6	5.5
Commercial and Non-PTV ITV Producers							5.5				
Non-PTV ITV Producer								4.0	3.1	2.9	3.2
Other	5.1	4.6	4.4	3.5	4.0	4.6	4.4	0.1	0.2	0.6	0.6
Distributor											
Local Distribution Only	11.3	10.0	7.4	6.8	6.2	5.6	4.9	6.4	5.7	4.9	4.4
Public Broadcasting Service	62.1	69.3	71.6	69.6	67.1	65.3	63.9	62.0	59.4	62.7	63.1
Regional PTV Network	9.6	6.2	5.4	7.6	10.8	13.0	14.0	17.8	23.8	23.1	23.3
Other	17.0	14.5	15.6	16.0	15.9	16.1	17.2	13.8	11.1	9.3	9.2
Presenter [5]											
Non-PBS Programs (No Presenter)										37.3	37.3
PBS Programs										62.7	62.7
WNET or WGBH										18.8	18.0
Single Presenter, Another Licensee										12.2	17.4
Co-Presentation of PTV Licensees										9.2	8.2
CTW										14.2	12.0
Non-PTV Presenters										7.1	6.9
Other										1.2	0.2

Notes:

1. 1974 and 1976 are calendar years. 1978 to 1994 are October through September fiscal years.
2. In 1988, 1990, 1992 and 1994 only broadcasters in the 50 US states were surveyed.
3. Producer definitions and categories were changed in 1984 and then again in 1992. The figures for those years compared to the previous years may vary simply due to the definitional changes.
4. In 1986 "U.S. Coproduction" replaced "Consortium".
5. Presenter information added in 1992. Previous years unavailable. The presenter is defined as the entity that negotiates program distribution agreements with PBS. It may or may not be the actual producer.

Before The
LIBRARY OF CONGRESS
Washington, D.C. 20024

In the Matter Of ADJUSTMENT OF THE RATES FOR NONCOMMERCIAL EDUCATIONAL BROADCASTING COMPULSORY LICENSE	)	Docket No. 96-6 CARP NCBRA

CERTIFICATE OF SERVICE

I am an associate at White & Case. On August 5, 1998, I caused to be served by hand or courier express/same day delivery true copies of the Petition of the American Society of Composers, Authors and Publishers To Modify the Report of the Arbitration Panel, Dated July 22, 1998 on the following;

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August 5, 1998

Samuel Mosenkis, Esq.